Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Application of GTE Corporation, Transferor,	)	**CC Docket No. 98-184**
And Bell Atlantic Corporation, Transferee,	)	
For Consent to Transfer Control of Domestic	)	
And International Sections 214 and 310	)	
Authorizations and Application to Transfer	)	
Control of a Submarine Cable Landing License	)	

REPLY COMMENTS OF BRIDGECOM INTERNATIONAL, INC.

BridgeCom International, Inc. (BridgeCom), through undersigned counsel and pursuant to *Public Notice*, DA 04-2903 (released July 13, 2004), hereby submits the following reply comments in support of the "Comments of AT&T Corp. to Verizon's Request to Eliminate Merger Condition XXII." Although BridgeCom supports the totality of AT&T Corp.'s ("AT&T") Comments, it will address here only one element of those Comments – *i.e.,* AT&T's showing that "Merger Condition XIII" – "Offering of UNEs" remains operative and has not "sunsetted" or otherwise ceased to require Verizon to make unbundled network elements available in accordance with the Commission's *UNE Remand Order*[1] and *Line Sharing Order.*[2]

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (Third Report and Order and Fourth Notice of Proposed Rulemaking), 15 FCC Rcd 3,696 (FCC released November 5, 1999) ("*UNE Remand Order*") (*subsequent history omitted*).

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98), 14 FCC Rcd 20,912 (FCC released December 9, 1999) ("*Line Sharing Order*") (*subsequent history omitted*).

In its reply comments below, BridgeCom will demonstrate that the "Offering of UNEs" commitment has not "sunsetted" because the generally applicable "sunset" provision does not apply to commitments that specifically establishes their own period of applicability, and that the "Offering of UNEs" commitment remains operative because there has not been a final and non-appealable resolution of the *UNE Remand* and *Line Sharing* proceedings. BridgeCom will further show that Verizon's suggestions to the contrary would not only render key elements of the "Offering of UNEs" commitment superfluous, but would deprive the commitment of any "practical effect."

In addressing this matter, it is important, as AT&T has emphasized, to bear in mind that the "Offering of UNEs" commitment was one of the central conditions to which Bell Atlantic Corporation ("Bell Atlantic") and GTE Corporation ("GTE") acquiesced in order to induce the Commission to approve a merger which the Commission had concluded would otherwise "not serve the public interest, convenience or necessity because it would inevitably slow progress in opening local telecommunications markets to consumer-benefiting competition."[3] Like the other commitments made by Bell Atlantic and GTE, the "Offering of UNEs" condition was "designed to mitigate the potential public interest harms of the . . . transaction, enhance competition in the local exchange and exchange access markets in which Bell Atlantic or GTE is the incumbent local exchange carrier . . . , and strengthen the merged firm's

[3] *In re Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License* (Memorandum Opinion and Order), 15 FCC Rcd. 14,032, ¶ 96 (FCC released June 16, 2000) ("*Merger Order*") (*subsequent history omitted*).

incentive to expand competition outside of its territories."[4] As the Commission explained, "absent conditions, the merger of Bell Atlantic and GTE . . . [would] harm consumers of telecommunications services by (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the 1996 Act; and (c) increasing the merged firm's incentives and ability to discriminate against entrants into the local markets of the merging firms."[5] And as the Commission further emphasized, "the asserted public interest benefits of the proposed merger . . . [would] not outweigh these public interest harms."[6] In short, absent the procompetitive commitments made by Bell Atlantic and GTE, including the critical "Offering of UNEs" condition, the FCC would have blocked the Bell Atlantic/GTE merger as contrary to the public interest, convenience and necessity.

The "Offering of UNEs" commitment made by Bell Atlantic and GTE was intended to "reduce uncertainty to competing carriers from litigation that . . . [might] arise in response to . . . [Commission] orders in the *UNE Remand* and *Line Sharing* proceedings, from . . . [that point] until the date on which the Commission's orders in

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4 *Merger Order*, 15 FCC Rcd. 14,032 at ¶ 4.

5 *Id.*

6 *Id.*

those proceedings, *and any subsequent proceedings*, become final and non-appealable."[7] Under the "Offering of UNEs Merger Condition," the merged entity would be required to make available "each UNE and combination of UNEs" that the *UNE Remand Order* and *Line Sharing Order* required it to provide, and to price such UNEs "at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order."[8] And this requirement was to continue -- in the event that the rules adopted in the *UNE Remand* and *Line Sharing* proceedings were "*stayed or vacated*" – until the date on which the Commission's orders in the *UNE Remand* and *Line Sharing* proceedings, and *any subsequent proceedings*, became final and non-appealable, unless prior to that date a final and non-appealable judicial decision determined that the merged entity was not required to provide the UNE or combination of UNEs in all or a portion of its operating territory. [9]

In that the "Offering of UNEs" commitment identifies a specific termination date, the "sunset" provision applicable to many of the other Bell

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[7] *Merger Order*, 15 FCC Rcd. 14,032 at ¶ 316 (*emphasis added*). Verizon has argued elsewhere that the Bell Atlantic/GTE "Offering of UNEs" commitment must be read apart from the Commission's understanding of that commitment, as expressed in the Commission's *Memorandum Opinion and Order* approving the Bell Atlantic/GTE merger. In this way, Verizon attempts to negate the Commission's reference to "any subsequent proceedings." Contrary to Verizon's claims, the Commission's understanding of the "Offering of UNEs" is dispositive. Not only is Verizon, as a carrier licensed by the Commission, bound by all conditions imposed by the Commission in the *Memorandum Opinion and Order* approving the application of Bell Atlantic and GTE to transfer control of those authorizations, but it is the "Offering of UNEs" commitment, and all other such commitments made by Bell Atlantic and GTE, as understood by the Commission, that paved the way for favorable agency action on the proposed merger. Bell Atlantic and GTE may have proposed the merger conditions, but it was the Commission's understanding of those commitments, as reflected in its *Memorandum Opinion and Order*, that secured for Bell Atlantic and GTE the result they sought.

[8] *Merger Order*, 15 FCC Rcd. 14,032 at ¶ 316.

[9] *Id.* (*emphasis added*).

Atlantic/GTE merger commitments, as AT&T has noted, does not apply to it. By its own terms, the "sunset" provision does not apply "where other termination dates are specifically established."[10] As the Commission has held in interpreting an identical "sunset" provision associated with commitments made by Ameritech Corp. ("Ameritech") and SBC Communications Inc. ("SBC") to secure FCC approval of their proposed merger,[11] a commitment that survives until the date of a final and non-appealable order "specifically establishes its own period of applicability."[12] And for this reason, the Commission held that the "Offering of UNEs" commitment made by Ameritech and SBC to secure approval of their proposed merger that identified a terminating event rather than a specific termination date was not subject to the "sunset" provision.[13]

Nor can it be said that the Commission's orders in the *UNE Remand* and *Line Sharing* proceedings, and any subsequent proceedings, have become final and non-appealable. As the Commission anticipated, the *UNE Remand Order* and the *Line Sharing Order* were vacated in pertinent part and remanded for subsequent proceedings

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10 *Merger Order*, 15 FCC Rcd. 14,032 at Appx. D, ¶ 64.

11 *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules* (Memorandum Opinion and Order), 14 FCC Rcd. 14,712, Appendix C, ¶ 74 (FCC released October 8, 1999) (*subsequent history omitted*).

12 *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules* (Memorandum Opinion and Order), 17 FCC Rcd. 19,595, ¶ 3, fn. 7 (EB released October 8, 2002).

13 *Id.*

before the Commission by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in *United States Telecom Association v. Federal Communications Commission*, 290 F.3d 415 (D.C. Cir. 2002 ("*USTA I*").[14] The *Triennial Review Order* was styled by the Commission as an "Order on Remand" and recognized as a subsequent proceeding on remand by the U.S. Courts of Appeals for both the Eighth Circuit and the District of Columbia Circuit.[15] The D.C. Circuit decision in *United States Telecom Association v. Federal Communications Commission,* 359 F.3d 554, 561 (D.C. Cir. March 2, 2004) ("*USTA II*") does not constitute a final and non-appealable resolution of the *UNE Remand* and *Line Sharing* proceedings, and any subsequent proceedings, because, on the one hand, U.S. Supreme Court review has been sought of that decision and, on the other hand, the D.C. Circuit remanded key elements of the *Triennial Review Order* to the FCC for subsequent proceedings.

Verizon has nonetheless argued elsewhere that the D.C. Circuit's decision in *USTA I,* constituted a final and non-appealable resolution of the *UNE Remand* and *Line Sharing* proceedings, and any subsequent proceedings. In so arguing, Verizon has inartfully sought to convert a triggering event into a termination event. In describing the

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[14] *Triennial Review Order*, 18 FCC Rcd. 16,978 at ¶ 31 ("[T]he D.C. Circuit vacated and remanded for further consideration the portions of the Commission's *UNE Remand Order* that adopted an interpretation of the 'impair' standard and established a list of mandatory UNEs and vacated and remanded as well the Commission's order requiring that the high-frequency portion of the loop be made available as a UNE.").

[15] *Eschelon Telecom, Inc. v. Federal Communications Commission*, No. 03-3212 (8th Cir. September 30, 2003) (*subsequent history omitted*) ("We find that the FCC's Order on Remand was entered, in part, on remand from the D.C. Circuit."); *United States Telecom Association v. Federal Communications Commission,* 359 F.3d 554, 561 (D.C. Cir. March 2, 2004) (*subsequent history omitted*) ("We invalidated much of the second effort (including separately adopted 'line-sharing' rules) in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C.Cir.2002). The Commission consolidated our remand in that case with its 'triennial review" of the scope of obligatory unbundling and issued the Order on review here.").

Bell Atlantic/GTE "Offering of UNEs" commitment, the Commission noted that the Commitment "only would have practical effect in the event that . . . rules adopted in the *UNE Remand* and *Line Sharing* proceedings . . . [were] stayed or vacated."[16] As the Commission explained, the commitment was required "to reduce uncertainty to competing carriers from litigation that may arise in response to . . . [its] orders in the *UNE Remand* and *Line Sharing* proceedings."[17] Such uncertainty, the FCC reasoned, would only occur in the event that orders in the *UNE Remand* and *Line Sharing* proceedings were "stayed or vacated."[18] Or put differently, the Verizon commitment would "kick-in" only in the event that the D.C. Circuit were to take the very actions that it ultimately took in *USTA I*. Hence, it is Verizon's contention that the event that the FCC identified as the only event that would give the Bell Atlantic/GTE "Offering of UNEs" commitment "practical effect" is actually the very event that relieved Verizon of that commitment, reducing to meaningless a condition that the Commission believed was necessary to render acceptable a merger it would otherwise have barred as inconsistent with the public interest. An argument which requires a conclusion that the Commission sanctioned a merger it deemed anticompetitive on the basis of a condition bereft of any substance obviously cannot stand.

Verizon has further argued elsewhere, however, that the Commission has already held to the contrary in an analogous circumstance, citing a letter issued by the Chief of the Common Carrier Bureau clarifying the requirement of the "Offering of

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16 *Merger Order*, 15 FCC Rcd. 14,032 at ¶ 316.

17 *Id.*

18 *Id.*

UNEs" commitment that UNEs be priced at cost-based rates in accordance with the Commission's forward looking pricing methodology.[19] Contrary to Verizon's claims, the referenced letter did not effectively declare that the merger conditions imposed no independent unbundling obligations on Verizon beyond those unbundling obligations which were not vacated by *USTA I*. Rather, the letter simply clarified that invalidation of the Commission's pricing guidelines by the U.S. Supreme Court would satisfy the "Offering of UNEs" commitment that UNEs be priced at total element long run incremental cost ("TELRIC") rates "until the date of any final and non-appealable judicial decision that determines that Bell Atlantic/GTE is not required to provide such UNEs at cost-based rates." Extending the ruling, as Verizon suggests, beyond its limited applicability to "pricing these UNEs at cost-based rates in accordance with forward looking cost methodology first articulated by the Commission in the *Local Competition Order*" would not only render superfluous the Commission's reference to "other subsequent proceedings," but would deprive the "Offering of UNEs" commitment of any meaning, ensuring that it terminated at the very moment the Commission intended it to "have practical effect."[20]

Bell Atlantic and GTE secured a substantial benefit from the commitments they made to secure Commission approval of their proposed merger. Absent these commitments, the merger would have "inevitably slow[ed] progress in opening local

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[19] Letter of Dorothy T. Attwood, Chief, Common Carrier Bureau, FCC to Michael Glover, Senior Vice President and General Counsel, Verizon, 15 FCC Rcd 18,327 (CCB released September 22, 2000).

[20] *Merger Order,*15 FCC Rcd. 14,032 at ¶ 316.

telecommunications markets to consumer-benefiting competition."[21] The "Offering of UNEs" commitment made by Bell Atlantic and GTE directly addressed this concern by "reduc[ing] uncertainty to competing carriers from litigation that . . . [might] arise in response to . . . [Commission] orders in the UNE Remand and Line Sharing proceedings,"[22] allowing the Commission to authorize the parties to move forward with the transaction. Verizon's predecessors having derived the full benefit of the "Offering of UNEs" and other commitments, the commitments must be strictly construed against Verizon to preserve for consumers the benefit of the bargain struck by the Commission. Accordingly, the "Offering of UNEs" commitment must be held to be fully operative until such future time as the Commission's orders in the *UNE Remand* and *Line Sharing* proceedings, *and any subsequent proceedings*, become final and non-appealable."[23]

By reason of the foregoing, BridgeCom urges the Commission to confirm that "Merger Condition XII" – "Offering of UNEs" remains operative and has not

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21 *Merger Order,* 15 FCC Rcd. 14,032 at ¶ 96.

22 *Id.* at ¶ 316.

23 *Id.* (*emphasis added*).

"sunsetted" or otherwise ceased to require Verizon to make unbundled network elements available in accordance with the Commission's *UNE Remand Order* and *Line Sharing Order*.

Respectfully submitted,

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